HOCK THAI FINANCE CORPORATION BHD

v.

TAI CHOI YU

HIGH COURT SABAH & SARAWAK, MIRI
HASAN LAH JC
[ORIGINATING SUMMONS NO: 24-98-97 (MR)]
22 DECEMBER 1999

CIVIL PROCEDURE: *Affidavits - Filing and service - Affidavit subsequent to affidavit in reply - Whether governed by 14-day period - Rules of the High Court 1980, O. 32 r. 13(2)(b)*

The defendant applied for a stay of execution of judgment pending his appeal to the Court of Appeal. In support of the application, the defendant filed two affidavits, *ie*, the 1st one in July 1999 and the 2nd one in December 1999. The plaintiff filed an affidavit in reply on 31st July 1999. The plaintiff objected to the use of the defendant's 2nd affidavit-in-support on the basis that it was not filed within the 14-day requirement after service of the plaintiff's affidavit in reply pursuant to O. 32 r. 13(2)(b) of the Rules of the High Court 1980 ('RHC').

Held:

[1] It is common knowledge that in most applications, affidavits subsequent to the affidavits filed in reply to the affidavits-in-support of the applications are being filed by the parties. If this is allowed to go on, unnecessary delay in the disposal of the cases concerned will result and therefore the object of having O. 32 r. 13(2)(b) RHC will not be attained.

[1a] The words in para. (b) in O. 32 r. 13(2) RHC, *ie*, "a party wishing to reply an affidavit served on him" and "affidavit he intends to reply was served on him" does not state "affidavit in support of an application" but just "affidavit". Therefore, this does not support the view that O. 32 r. 13(2)(b) is only applicable to an affidavit in reply to the affidavit-in-support of the application. It followed that the 14-day requirement for filing under O. 32 r. 13(2)(b) applied to the defendant's 2nd affidavit-in-support. Thus, it could not be used for the purpose of the defendant's application herein.

[Preliminary objection allowed.]

Case(s) referred to:
KS Chua & Co v. Chui Miang Chew & Ors [1995] 4 MLJ 436 ***(refd)***
Majlis Daerah Dungun v. Tenaga Nasional Berhad [1998] 1 AMR 516 ***(refd)***
Natseven TV Sdn Bhd v. Television New Zealand Ltd (High Court at Kuching Suit No. 22-179-98-11) ***(refd)***
Pemunya Kapal MV Brihope & Ors v. Emmanuel E Okwuosa [1997] 1 MLJ 453 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 32 r. 13(2)(b)

For the plaintiff - Kevin Kong; M/s Khoo & Co
For the defendant - Tai Choi Yu; M/s Tai Choi Yu & Co

Reported by Usha Thiagarajah

JUDGMENT

Hasan Lah JC:

By summons in chambers dated 8 July 1999 (encl. 45) the defendant is applying for a stay of execution of the judgment pending the final disposal of the defendant's appeal to the Court of Appeal. In support of that application the defendant filed two affidavits – the affidavit in support affirmed on 7 July 1999 by Mr. Tai Choi Yu and the affidavit-in-support (11) affirmed by Mr. Tai Choi Yu on 30 November 1999 which was filed on 1 December 1999. The plaintiff filed an affidavit-in-reply affirmed by Wong Lee Chin on 30 July 1999 which was filed on 31 July 1999.

The application was fixed for hearing on 1 December 1999. At the outset of the hearing of the application the learned counsel for the plaintiff objected to the use of the defendant's affidavit-in-support (11) on the ground that it was not filed within 14 days after the service of the plaintiff's affidavit-in-reply which is in contravention of O. 32 r. 13(2)(b) of the Rules of the High Court 1980.

In response to that the learned counsel for the defendant submitted that O. 32 r. 13(2)(b) has no application to the defendant's affidavit-in-support (11). According to the learned counsel O. 32 r. 13(2)(b) is only applicable to an affidavit-in-reply to the affidavit in support of an application but it does not apply to a subsequent affidavit.

At the moment there are two lines of authorities on the interpretation of the provision of O. 32 r. 13(2)(b) of Rules of the High Court 1980.

In *KS Chua & Co v. Chui Miang Chew & Ors* [1995] 4 MLJ 436 Abdul Malik Ishak J opted for the wider interpretation of O. 32 r. 13(2)(b), *viz* that it applies

to subsequent affidavits. At p. 442 and 443 of the report the learned judge opined:

> Now, reverting back to O. 32 r. 13(2)(b) of the RHC which came by way of an amendment *vide* PU(A) 193/93 where it imposes on a party wishing to reply to an affidavit served on him, a mandatory obligation to file his affidavit and serve it on the other party within 14 days from the date on which the affidavit he intends to reply was served on him unless provided by the rules. This onerous obligation is also placed on the applicant who files affidavit in support of his application to file and serve on the other party within 14 days from the date of the filing of the said application (see O. 32 r. 13(2)(a) of the RHC). Thus, under this new O. 32 r. 13(2) of the RHC a strict time table has been set by the Rules Committee and my impression of it is that it is draconian as it does not give much room space to manoeuvre for the applicant to file a further affidavit in support of his application after 14 days from the date of filing of the application. In the event the respondent files an affidavit in reply which alleges a certain fact detrimental to the applicant, the applicant must reply otherwise those facts not replied will be deemed to be accepted by the applicant (*Alloy Automobile Sdn. Bhd. v. Perusahaan Ironfield Sdn. Bhd.* [1986] 1 MLJ 382; *Overseas Investment Pte Ltd v. Anthony William O' Brien & Anor* [1988] 3 MLJ 332; and *Abdul Razak Ahmad v. Majlis Bandaraya Johor Bahru* [1995] 2 MLJ 287) and this must surely be the dilemma which the applicant must go through. The strict requirement under this rule will simply mean that the courts are not obliged and indeed are precluded from considering any affidavits filed out of the 14-day period unless applications to file those affidavits out of time formally have been made and granted by the courts. In my judgment, the plaintiffs here have breached the strict requirements of O. 32 r. 13(2)(b) of the RHC. Bereft of any formal application to file those affidavits in encls. 45, 48, 43 and 44 out of time, I have no choice but to ignore those affidavits.

In *Majlis Daerah Dungun v. Tenaga Nasional Berhad* [1998] 1 AMR 516 Mohd Noor b. Hj Ahmad J was of the view that O. 32 r. 13(2) applies only to an affidavit filed in support of an application in chambers and to an affidavit in reply to the affidavit in support of such application, but not a subsequent affidavit.

In the recent case of *Natseven TV Sdn. Bhd. v. Television New Zealand Ltd.* (High Court at Kuching Suit No. 22-179-98-11) (unreported) Muhammad Kamil bin Awang J agreed with the said decision where the learned judge said:

> Applying the golden rule of construction, subrule 2 of Rule 13, does not apply to a subsequent affidavit as the 14 days rule expressly states that it is applicable to two types of affidavit; namely, an affidavit in support of the application, and an affidavit in reply thereto.

The rationale for the introduction of O. 32 r. 13(2) has been clearly stated by Mahadev Shanker JCA in *Pemunya Kapal MV Brihope & Ors. v. Emmanuel*

E Okwuosa [1997] 1 MLJ 453 at p. 470 that:

> Order 32 r 13(2) of RHC was specially enacted to eradicate the rampant abuse of process by malevolent, indolent or unpaid practitioners who had devised a fall-safe method of causing unwarranted delays by filing affidavits at the last minute. The rule is mandatory.

It is my view that if the view that O. 32 r. 13(2)(b) is only applicable to the affidavit in reply to the affidavit in support of the application is correct then O. 32 r. 13(2)(b) would not serve its purpose because the parties are allowed to file the subsequent affidavits at the last minute which invariably would lead to adjournment of the hearing as the other party might want to reply to the said affidavit. It is common knowledge that in most of the applications further affidavits subsequent to affidavit filed in reply to affidavit in support of the application are being filed by the parties. If this is allowed to go on unnecessary delay in the disposal of the cases concerned would result and therefore the object of having O. 32 r. 13(2)(b) has not been attained. In the circumstances I agreed with the view that O. 32 r. 13(2)(b) is also applicable to subsequent affidavits.

For ease of reference I reproduce O. 32 r. 13(2) of Rules of the High Court 1980. It states:

> Save as otherwise provided in these rules –
>
> (a) an affidavit intended to be used in support of an application must be filed and served on the other party within 14 days from the date of the filing of the application; and
>
> (b) a party wishing to reply an affidavit served on him must file his affidavit and serve it on the other party within 14 days from the date on which the affidavit he intends to reply was served on him.

It is to be observed that the words used in para. (b) are "a party wishing to reply an affidavit served on him" and "the affidavit he intends to reply was served on him". It does not say "affidavit in support of an application" but it just states "affidavit". In my view such wordings do not support the view that O. 32 r. 13(2)(b) is only applicable to affidavit in reply to the affidavit in support of the application.

For the aforesaid reasons I ruled that O. 32 r. 13(2)(b) is applicable to the defendant's affidavit-in-support (11). As the said affidavit was filed in contravention of O. 32 r. 13(2)(b) I further ruled that it could not be used for the purpose of the application (encl. 45).